STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME/IOWA COUNCIL 61, Complainant,	)	
and	)	CASE NO. 4993
CITY OF SIOUX CITY, Respondent.	)	

PROPOSED DECISION AND ORDER

The American Federation of State, County and Municipal Employees/Iowa Council 61 (AFSCME) filed a prohibited practice complaint with the Public Employment Relations Board (PERB or Board) against the City of Sioux City, Iowa, pursuant to section 11 of the Public Employment Relations Act (the Act), Iowa Code chapter 20. AFSCME's complaint, as amended, alleges the City's commission of prohibited practices within the meaning of sections 20.10(1) and 20.10(2)(a), (c), (e) and (f)[1] by its implementation of certain employee pay adjustments on July 1, 1993, which differed from those which had been negotiated by the parties.

Pursuant to notice, a hearing was held before me in Sioux City, Iowa, on July 8, 1994. Both parties were represented, Dan Homan for AFSCME and James Hanks for the City. The parties were afforded full opportunity to present evidence in support of their respective positions. Both waived oral summation and submitted written briefs, the last of which was filed on November 16, 1994.

[1]These and all other statutory citations are to the Code of Iowa (1993).

Based upon the entirety of the record, and having considered the parties' arguments, I propose the following findings of fact and conclusions of law.

FINDINGS OF FACT

The City is a "public employer" within the meaning of section 20.3(11) and AFSCME is an "employee organization" within the meaning of section 20.3(4). AFSCME has been certified by the Board as the exclusive bargaining representative for certain employees of the City.

AFSCME and the City have been parties to a continuous series of collective agreements negotiated pursuant to the provisions of the Act, the first of which was effective for 1977-78. Each agreement has contained a salary schedule setting forth the pay of unit employees and a number of negotiated rules concerning the schedule's administration.

In the schedule itself, each of the job classifications occupied by unit employees is listed in a numbered pay range. Each pay range is divided into steps, which represent the biweekly pay amounts applicable to the employees in the range. The parties' 1992-93 salary schedule contained five steps in each pay range, each progressive step representing a higher biweekly salary.

The negotiated rules concerning the administration of the salary schedule have remained virtually unchanged throughout the parties' relationship, with the exception of one provision not relevant here. Generally stated, the rules address the initial step placement of new City employees within the applicable pay

range, employee eligibility for movement through the steps in a range (and procedures affecting such movement), and employee "pay rate adjustments." The provisions concerning pay rate adjustments mention four types of personnel actions: transfers, promotions, demotions and temporary assignments.

Neither the provision concerning transfers, nor that regarding demotions, specifically contemplates an employee's movement from one pay range to another. The provisions concerning promotions and temporary assignments, however, do anticipate an employee's assumption of a position (although possibly temporarily) in a job classification within a higher pay range. When such movement occurs by virtue of promotion or temporary assignment, the rules provide that the affected employee is placed at step one (the lowest step) of the new (higher) pay range unless the rate of pay for that step is less than or equal to the pay previously received by the employee, in which case the employee is advanced to the lowest step within the new range which represents a rate of pay greater than that formerly received.

During the course of the parties' collective bargaining relationship the movement of employees to higher pay ranges has periodically occurred. Such movement has occurred due to promotions and temporary assignments (personnel actions specifically contemplated by the salary schedule administration rules) as well as due to employee appointments to newly-created classifications and the negotiated reassignment of job classifications to higher pay ranges. The parties do not view

these latter types of movements as being within the scope of the "pay rate adjustment" provisions of the schedule administration rules.

However, regardless of the reason for the movement of an employee to a more highly-paid range (and thus regardless of whether the movement was specifically covered by the negotiated rules or not), the City has uniformly followed the step placement procedure applicable to promotions and temporary assignments by placing the affected employee on the lowest step of the new range unless that placement did not result in a pay increase, in which case the employee was placed on the lowest step in the new range which did represent a pay increase.

On or about October 27, 1992, AFSCME presented its initial bargaining position for a 1993-94 agreement to the City in a meeting conducted pursuant to section 20.17(3). AFSCME's initial position was lengthy, and proposed changes to nearly all of the existing agreement's 24 articles, as well as to the appendices containing the salary schedule and schedule administration rules.

As appears to have been his practice since his 1988 appearance as AFSCME staff representative for the unit, Dan Homan explained the Union's opening position for the City's representatives by providing them with copies of the contract AFSCME proposed, with all proposed changes from the current contract indicated, and by going through the proposal page by page, explaining the proposed changes as he went. Although proposing substantial changes to the salary schedule administration rules, AFSCME proposed no changes to

the existing "pay rate adjustment" provisions except for a change applicable to demotions, which is not relevant here.

As to the salary schedule itself, in addition to proposing a uniform across-the-board wage increase for all unit employees, AFSCME proposed the creation of two new job classifications (Customer Service/Utility Billing Representative and Lead Customer Service/Utility Billing Representative) and their placement at pay ranges 13 and 17, respectively. The proposal to create the new classifications was motivated by AFSCME's perception that the positions occupied by certain Clerks in the City's water billing department had, due to the City's institution of a storm water drainage fee, evolved to include new and specialized duties and responsibilities which justified their reclassification at higher pay ranges.

AFSCME, for a number of reasons, desired that the affected employees, upon reclassification, not only move to the new, higher pay range, but also to the same step of the new range as the employee had occupied in the old, a concept the parties at hearing referred to as "step-for-step" movement.[2]

While the proposed creation of the new classifications and their proposed pay ranges were evident on the face of AFSCME's written proposal, the proposal itself was silent concerning the step placement of the potentially-affected employees. Four members

---

[2]For example, if a Clerk formerly at step 4 in pay range 7 was to be reclassified as a Customer Service/Utility Billing Representative in a new pay range, "step-for-step" movement would result in the employee's placement at step 4 of the new range.

of the AFSCME bargaining team testified, however, that the reclassification and "step-for-step" movement of these employees was a high priority for the Union and that Homan, during his presentation of the Union's position, explained that "step-for-step" movement was part of the Union's proposal.

Notwithstanding Homan's oral references to "step-for-step" movement as part of the Union's reclassification proposal, the City's negotiators did not hear or grasp the concept, and they left the initial bargaining session under the mistaken impression that AFSCME sought only the movement of the employees to new classifications at higher pay ranges, and that it had made no proposal concerning their step placement. In view of the established practice concerning step placement, the City understood AFSCME's proposal as contemplating step placement of the reclassified employees in accordance with that practice.

In preparation for the second public bargaining session, the City prepared a cost analysis of AFSCME's initial position. This analysis purported to calculate the increased annual cost the City would bear should the entirety of AFSCME's initial proposal become the parties' successor agreement.

Consistent with its perception, albeit mistaken, of the AFSCME reclassification proposal, the City calculated the cost of the increased wages which would result from the reclassification with the assumption that the step placement of the reclassified Clerks

would be according to the established practice.[3] The City's calculation revealed that the proposed reclassification of four full-time and three part-time employees as Customer Service/Utility Billing Representatives would increase its expenditures by $9,630 in 1993-94, and that the reclassification and range change of one employee to Lead Customer Service/Utility Billing Representative would increase its cost by $1,197.[4] These projected increased costs were shown as two separate line items in the "wages" section of the one-page analysis summary (joint exhibit 3) which the City prepared.

At the second public bargaining session the City presented its initial bargaining position, including responses to AFSCME's initial proposals. Although proposing an across-the-board wage increase for unit members, the City's initial position flatly rejected AFSCME's proposal that the two new classifications be created, and thus was silent on the matter of pay ranges or step placement of any reclassified employees. As it has traditionally done, the City also presented AFSCME with a copy of joint exhibit 3, its calculation of the cost of the Union's initial proposal. The actual working papers generated by the City in computing the

---

[3]The City utilized the then-current salary schedule as the basis for its computation, so as not to include in the reclassification calculation the effect of the across-the-board wage increase AFSCME had proposed, which was computed separately.

[4]By contrast, had the City's calculation contemplated the "step-for-step" movement AFSCME sought, the calculation would have revealed a substantially larger increase--$21,497.58 for the Customer Service/Utility Billing Representatives and $4,215.90 for the Lead Customer Service/Utility Billing Representative.

various figures on the cost analysis were not presented to the Union, nor were the City's methods of computing the figures explained in the City's presentation, but it is undisputed that AFSCME's negotiators did not request any such information or voice any concern about the accuracy of the City's costing of the reclassifications or any other item shown on the analysis.

It is apparent that AFSCME views the annual presentation of the City's analysis of the cost of the Union opener as having little significance and as little more than the City's opportunity to publicize the economic magnitude of the Union's demand. It is also undisputed, however, that AFSCME could have discerned how the City interpreted the Union's reclassification/pay range change proposal had it asked how the relevant figures had been calculated by the City or had it independently calculated the cost and included the "step-for-step" movement it desired. It did neither.

In subsequent closed bargaining sessions the Union's reclassification/pay range change proposal was again discussed. It is uncontroverted, however, that during these negotiations neither AFSCME nor the City so much as mentioned the step placement of any employees who might ultimately be reclassified. Instead, in view of the City's initial position that no reclassifications take place, the parties focused on whether any reclassifications would occur, and if they did, the extent of the pay range increases which would accompany the reclassifications.

The record suggests that hard bargaining took place concerning the reclassification/pay range change proposal, and it was not

until mediation that a tentative agreement was reached, which was subject to ratification by the Union's membership and the City's governing body. In the document setting forth the tentative agreement the City agreed to the creation of the two new classifications sought by AFSCME, but at pay ranges substantially lower than those initially proposed by the Union. The tentative agreement was silent as to the step placement of the employees who were to be reclassified and compensated at new pay ranges.

The City Council, which had initially opposed any pay range changes, ratified the compromise reached by its bargaining team. Its understanding, and that of its negotiators, was that the reclassified employees would be placed on steps in the new ranges in accordance with the existing practice. The AFSCME team, although never having mentioned its desire for "step-for-step" placement since the initial bargaining session, and having neglected to seek the inclusion of any provision concerning step movement in the tentative agreement, nonetheless believed that the City had agreed to such movement. Its membership ratified the tentative agreement.

Presumably, the parties' agreement was reduced to writing and signed by the parties as required by section 20.9.

The successor agreement became effective July 1, 1993. In accordance with its belief as to the terms of the agreement it had reached with the Union, and consistent with its past practice, the City placed each reclassified employee on the lowest step of the new negotiated pay range which represented a pay increase for that

employee. Upon payment of the reclassified employees at their new rate, the employees and AFSCME discovered that they had not received "step-for-step" movement, and the instant prohibited practice was filed, alleging that the City did not honor its agreement to provide "step-for-step" placement for the reclassified employees.

AFSCME's complaint, as amended, alleges the City's commission of prohibited practices within the meaning of sections 20.10(1), 20.10(2)(a), (c), (e) and (f). Those sections provide:

> **20.10 Prohibited practices.**
> 1. It shall be a prohibited practice for any public employer, public employee or employee organization to willfully refuse to negotiate in good faith with respect to the scope of negotiations as defined in section 20.9.
>
> 2. It shall be a prohibited practice for a public employer or the employer's designated representative willfully to:
> *a.* Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.
> . . .
> *c.* Encourage or discourage membership in any employee organization, committee or association by discrimination in hiring, tenure, or other terms or conditions of employment.
> . . .
> *e.* Refuse to negotiate collectively with representatives of certified employee organizations as required in this chapter.
>
> *f.* Deny the rights accompanying certification or exclusive recognition granted in this chapter.
> . . .

CONCLUSIONS OF LAW

AFSCME's claim that a prohibited practice was committed by the City appears to be based upon alternative theories.

Initially, and perhaps most simply, the Union argues that the City agreed to "step-for-step" movement for the reclassified employees, then reneged on the agreement and instead implemented step movement which was consistent with the parties' past practice. AFSCME's complaint, as amended, labels the City's conduct as "bad faith bargaining", and thus apparently suggests that the City actively bargained to the point of agreement even though it had no intent to honor its commitment.

AFSCME's amended complaint also purports to assert a unilateral change theory. Although not fully articulated at any point, the Union apparently claims that the City, having agreed to "step-for-step" movement during good-faith negotiations, later implemented something else without the consent of the Union or the notice and opportunity for bargaining which the Act requires before unilateral changes in mandatorily-negotiable subjects may be lawfully implemented. This theory, rather than involving the existence of affirmative "bad faith" in the City's bargaining conduct, instead relies upon the absence of required negotiations. Both theories, however, are based upon the premise that the parties in fact agreed to "step-for-step" movement for the reclassified employees.

AFSCME's brief, however, also suggests a somewhat different theory: That the City recognized AFSCME's position concerning the

step movement of the affected employees but never responded to it and thus bargained in such a way as to give the Union the false impression that the City had acquiesced to the Union's demand, without doing so in fact. This apparent theory, like the first noted above, relies on the claim that the City actively bargained with a deceptive "bad faith" state of mind.

I.

I cannot conclude that AFSCME has carried its burden of establishing a prohibited practice by the City on either of the theories seemingly asserted in its complaint because the record simply does not show that the parties ever in fact agreed upon "step-for-step" movement for the reclassified employees.

What is clear from the record is that although AFSCME wanted "step-for-step" movement, the City never understood such step placement to be a part of the Union's initial proposal or any subsequent proposal which the Union may have made. Whether the reason for this misunderstanding was AFSCME's failure to clearly communicate its position at the initial bargaining session, inattentiveness by the City's representatives, or a combination of factors, is not particularly relevant. What is relevant is the fact that a fundamental misunderstanding arose at the initial bargaining session which the parties never recognized and rectified so that a true meeting of the minds could take place.

It is indeed unfortunate that the Union's extensive written proposal did not mention "step-for-step" movement. Equally unfortunate is the fact that AFSCME never itself analyzed the

City's economic analysis of the Union's initial position, for such an analysis would have revealed the City's failure to understand the "step-for-step" aspects of AFSCME's proposal. Similarly unfortunate was the Union's failure, although substantial bargaining subsequently took place, to ever so much as mention step placement, as well as its failure to insist that the parties' tentative agreement make some reference to the step placement "agreement" it supposedly had made.

This case is yet another illustration of the problems which inevitably result when parties fail to clearly communicate and instead make assumptions concerning the understanding and intent of those with whom they are bargaining. The problem is only exacerbated when the parties fail to insure that the documents they produce contain the totality of their understandings.

PERB has long recognized that mutual agreement to the contract's terms must exist in order for there to be a valid and binding contract. City of Clinton, 77 H.O. 838; Ottumwa Community School District, 82 PERB 2140. Cf. Fort Dodge Community School District, 94 PERB 5113. In the present case the City never realized, until after the fact, that "step-for-step" placement was an issue in the negotiations. Consequently, the meeting of the minds necessary to form a binding agreement that "step-for-step" movement would take place never occurred.

Having concluded that the City never agreed to the "step-for-step" placement of the reclassified employees, it necessarily follows that AFSCME has failed to establish the City's commission

of a prohibited practice based upon any theory premised upon the existence and subsequent breach of such an agreement.

II.

The theory suggested by AFSCME's brief appears to be an assertion of active "bad faith bargaining" by the City. The Union, emphasizing that it had explained that "step-for-step" movement was part of its proposal, and apparently contending that the City could not have understood otherwise, points to the City's failure to inform the Union during negotiations that it instead anticipated step placement in accordance with the parties' past practice, and its failure to explain how it had calculated the cost of the Union's reclassification/range change proposal, as factors supporting its claim.

The duty to bargain in good faith has been generally characterized as the obligation to actively participate in deliberations with a present intention to find a basis for agreement and with a sincere effort to reach a common ground. See, e.g., NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943); Humboldt County, 76 H.O. 703. "Bad faith bargaining" constitutes not only a prohibited practice within the meaning of section 20.10(1), but also under sections 20.10(2)(a), (e) and (f).

Because a party's intention or sincerity are subjective characteristics, it has long been recognized that the presence or absence of the requisite intent must be inferred from the circumstantial evidence found in the record as a whole, i.e., the "totality of conduct" must be examined. See, e.g., General

Electric Co., 150 NLRB 192 (1964), *enforced* 418 F.2d 736 (2nd Cir. 1969), *cert. denied* 397 U.S. 965 (1970); City of Ankeny, 76 H.O. 675; Charles City Community School District, 76 H.O. 680 & 783.

Having examined the totality of the City's bargaining conduct as revealed by the record, I cannot conclude that it bargained with anything but a sincere effort to reach a common ground. As previously indicated, the record reveals nothing more than the existence of a fundamental misunderstanding which occurred and continued due to a failure of effective communication.

In view of the fact that the City never recognized step movement as an issue, one certainly cannot view its failure to highlight the differences between its position and the Union's as evidence of bad faith, for it has not been shown that the City ever recognized that differences existed. Nor can one justly view the City's failure to explain how it calculated each of the many figures on its cost analysis as any indication of bad faith.

While I have found that Homan in fact mentioned the "step-for-step" concept in his initial presentation of the Union's reclassification/range change proposal, there is nothing in the record which indicates that the City's failure to grasp the idea that step placement was an issue was intentional or feigned, or that the City did or failed to do anything in a manner which was inconsistent with its duty to attempt to reach a voluntary agreement with the Union.

I conclude that AFSCME has failed to establish that the City engaged in "bad faith bargaining" during its negotiations with the Union for a 1993-94 collective bargaining agreement.

III.

AFSCME's amended complaint also asserts a claim that the City's conduct constitutes a prohibited practice within the meaning of section 20.10(2)(c), previously quoted in its entirety.

The record is devoid of any evidence which establishes the existence of any discrimination in hiring, tenure, or other terms or conditions of employment by the City against any employee, much less for the purpose of encouraging or discouraging membership in any employee organization, committee or association.

I thus conclude that AFSCME has failed to establish the City's commission of a prohibited practice within the meaning of section 20.10(2)(c).

Accordingly, I propose entry of the following:

ORDER

The prohibited practice complaint filed herein by AFSCME/Iowa Council 61 is hereby DISMISSED.

DATED at Des Moines, Iowa this 24th day of January, 1995.

Jan V. Berry,
Administrative Law Judge